United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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No. 22487

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
for the District of Columbia Circuit

FILED APR 18 1969

Nathan J. Paulson
CLERK

LAWRENCE H. STEWART,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

Appeal From Conviction for
Second Degree Burglary

BRIEF FOR APPELLANT

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

LAWRENCE H. STEWART, Appellant,	)	
v.	)	No. 22,487
UNITED STATES OF AMERICA, Appellee.	)	

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CERTIFICATE OF SERVICE

I hereby certify that I have served two copies of the BRIEF FOR APPELLANT in the above entitled case, on the following counsel of record, this 18th day of April 1969.

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Index

Statement of Issues. 2

Statement of Case. 2

Facts. 3

Argument 10

Conclusion 24

Cases

Bell v. U. S., 108 App.D.C. 169, 280 F2d 717 (1960). 21

Carter v. U.S., 102 App.D.C. 227, 252 F2d 708 (1958) 16

Gilbert v. State of California, 388 U.S. 263 20

Headen v. U.S., 115 App.D.C. 81, 317 F2d 145 (1963). 23

Hinton v. U.S., 91 App.D.C. 13, 196 F2d 605 (1952) 19

Jackson v. United States, 123 App.D.C. 348, 359 F2d 1014
(1965). 10

Jones v. U. S., 119 App.D.C. 213, 338 F2d 553 (1964) 23

Kelly v. United States, 90 App.D.C. 125, 194 F2d 150 (1950). .10

Md. and Va. Milk Prod. Assn. v. U.S., 90 App.D.C. 14,
193 F2d 907 (1952). 16

McFarland v. U.S., 80 App.D.C. 196, 150 F2d 593 (19). . . .23

Rouse v. United States, 123 App.D.C. 348,
359 F2d 1014 (1966) 10

Stovall v. Denno, 388 U.S. 293 20

U. S. v. Wade, 388 U.S. 218. 20

Wood v. U. S., 120 App.D.C. 163, 344 F.2d 548 (1965) 23

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No. 22487

LAWRENCE H. STEWART,
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v.

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Appellee.

Appeal From Conviction for
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BRIEF FOR APPELLANT

Statement of Issues

I It was error for the District Court to deny appellant's motion for a directed verdict of acquittal at the close of the evidence, in that

A. Substantial contradiction between the only two identity witnesses (police officers) creates reasonable doubt as a matter of law.

B. Proof of identification was inadequate.

II Alternatively, the case should be remanded for a new trial on grounds of undue prejudice, in that the prosecution improperly suggested that appellant was holding stolen property.

Statement of Case

Appeal is taken from a conviction and sentence on October 4, 1968, for second degree burglary,upon the verdict of a jury. Defendant was arrested March 13, 1968, tried on July 10-12, 1968, found guilty as charged, and was sentenced to imprisonment for a period of 18 to 54 months.

The indictment and conviction were pursuant to §22-1801(b) of the District of Columbia Code which provides in pertinent part

> " (b). . .whoever shall. . .break and enter, or enter without breaking, any. . .building. . .with intent. . .

> to commit any criminal offense, shall be guilty of burglary in the second degree. Burglary in the second degree shall be punished by imprisonment for not less than two years nor more than fifteen years."

Notice of appeal was filed October 4, 1968. A Conditional Work Release has been granted to defendant pending the determination of this appeal.

Facts

General:

The Neighborhood Bar and Grill, the property of one Eva B. Turner, is located at 1734 Fourteenth Street, N.W., on the west side of Fourteenth between R and S Streets. The store is about 60 feet deep. The front half is a dining room and, through swinging doors, the rear half is a kitchen. The street front is a bay window of glass with a windowed metal door at the north end (Tr. 30-32). In the dining room a bar runs from back to front of the dining room and both sides of this bar can be seen through the window (Tr. 62). Two cash registers are located at the back of the dining room on a steel table (Tr. 37). At night a register is customarily left open with a single dollar bill in it attached to a silent alarm of the Capital Burglar Alarm System. One or more lights are left on at night.

There is a rear yard behind the building. With considerable confusion of testimony, it would appear there are high barbed wire fences enclosing the north and south bounds of this yard. At its west end the yard is separated from an alley between R and S Streets by a garage which is kept locked. (Tr. 56-60)

Testimony of Eva B. Turner:

Mrs. Turner locked and closed up the Neighborhood Bar and Grill about 11 p.m. on the night of March 12, 1968, and went to her brother's place a few doors north. Some time after two o'clock in the morning, she was called by the police, came down and opened the front door of the Bar and Grill. She did not admit Walls through that door (Tr. 53). At some point she did discuss with Officer Walls the question of whether there had been a dollar in the register that night (Tr. 33), stated that it was in fact missing (Tr. 54), found a side window on an areaway pried up and the latch broken (Tr. 56). At that point in time the garage doors in the back were both still secured as reported by her brother (Tr. 64).

Testimony of Officer Walls:

On March 12, 1968, Walls was on night duty in a one-man scout car (Tr. 68). At 1:59 a.m. he was at Thirteenth and Q Streets, N.W., and received a "radio run" to go to the Neighborhood Bar and Grill where he arrived one minute later (Tr. 69) with his red light and siren off (Tr. 69) as well as his headlights (Tr. 79). Walls got out of his car and went to the front window of the Grill and "observed the subject inside". . ."twenty feet from the show window, proceeding toward me." (Tr. 70) "There may have been one light on." Walls described "the subject" as being behind the bar extending toward the front of the restaurant about twenty feet away coming toward the front, who then "stopped and crouched down." (Tr. 71)

Walls states that the only action he took was to proceed back to his scout car to call for assistance. As he did so, watching through the window, the person he saw "started moving towards the rear of the restaurant." (Tr. 71) When Walls went back to the scout car he "turned the spotlight on the premises when I went back to call for assistance" (Tr. 81), lost sight of "the subject" momentarily, went back from his car to the front door to

check this and

> "it was all secured, so I then proceeded to the rear of the store, (Tr. 72)

stating that he drove around to the rear in about 30-35 seconds.

> "As soon as I got around to the rear of the store, more assistance came and we completely encircled the location." (Tr. 72)

Walls stated there were no gates into the back yard and that another officer climbed the fence to get in (Tr. 74) while Walls himself forced the lock on one of the garages and went through the garage into the rear yard

> "One of the policemen pulled the hinge off the lock and the hasp ." (Tr. 90)

In the rear yard the officers began to search and continued this for five to ten minutes without finding anything

> ". . .we didn't find anything so we decided to release the dogs inside then." (Tr. 75)
>
> "We were standing there discussing whether or not to release them, and the subject approached us and surrendered. . .we were standing just inside the rear yard."

The defendant came up to Walls from the rear (the alley side)

> "I don't know where he was. (Tr. 107)
>
> . . .
>
> "I was standing with my rear side to the alley side to the best of my knowledge, facing the rear of the restaurant, and he came up from my rear. I have no idea of the exact location of where he was." (Tr. 108)

And Walls is unable to make any determination as to where the defendant came from (Tr. 108). Walls cannot recall any shrubbery in the rear yard but believes there were some obstacles behind which a person might hide (Tr. 108). Walls was talking with another officer at the time when the defendant approached him (Tr. 111). The defendant was between Walls and the alley (Tr. 116).

Officer Walls identified the defendant as "the person who surrendered" (Tr. 77) and the same person that he "saw inside the premises" (Tr. 77). Later Walls was admitted to the front of the restaurant by Mrs. Turner through the front door (Tr. 100).

No implements were found (Tr. 96) which could have been used to pry open a window. Walls didn't request any fingerprint assistance (Tr.97). Appellant was not wearing gloves, and his clothes were not torn (Tr. 96).

Testimony of Appellant:

Stewart is a West Indian from the Virgin Islands who left there 14 years ago at the age of 17 to come to this country. (Tr. 147) At the time of his arrest he was employed at Hogates Restaurant (Tr. 120).

Stewart has been playing bongo and congo drums all of his life (Tr. 147). He customarily goes to Dupont Circle where he meets with other friends and they play together usually to a crowd (Tr. 149). On the night of March 12, 1968, Stewart left Hogates between 6 and 6:30, went by bus to Dupont Circle arriving there about 7 p.m. (Tr. 120). Ther he met a friend with whom he often played, Jimmy Alexander, who brought along his drums (Tr. 148). There was the usual crowd at Dupont Circle during the evening but only he and Alexander were playing (Tr. 149).

Stewart left the Circle at midnight and went across the street to the Harvard House coffee shop just off the Circle where he and Alexander drank coffee, talked music, and stayed a couple of hours (Tr. 121). (The timing here is confused on the record (Tr. 137-8) but is not critical to any point at issue.)

Stewart left the Harvard House to walk home. He lives in the 1800 block of Fourteenth Street, one block above the Neighborhood Bar and Grill (Tr. 125). He went across town from the Harvard House along R Street, then between Fifteenth and Fourteenth turned into the alley which ran from R to S, his customary shortcut home (Tr. 147). As he walked up the alley a scout car came toward him from the direction of S Street with the dome light shining, pulled up along side of him (Tr. 125). The policemen in the car, identified as Officer Walls (Tr. 127), turned his flashlight on Stewart and asked him where his buddy was (Tr. 125). Two other police came, and Officer Walls took him into the rear yard of the Neighborhood Bar and Grill by pushing open the door of a garage (Tr. 127) and opening a wire fence (Tr. 128). The officers accused Stewart of having broken into the Neighborhood Bar and Grill which Stewart denied (Tr. 130), and he was then taken out the same way out through the garage, put in the police truck (Tr. 126) and taken to the precinct. There his money, $1.04, was taken from his, but the dollar was later returned by the police (Tr. 131).

Testimony of Officer Klopfer:

Klopfer, riding alone in a police cruiser, also picked up the 1:59 a.m. call to Neighborhood Bar and Grill. He also drove up to the front of the premises where he talked with Officer Walls (Tr. 153) for about a minute (Tr. 170; Tr. 183). He and Walls separately drove around

to the alley in back of the store where some K-9 officers and another sergeant from the 2nd Precint were already or came later. Walls and he made their way together through the garage into the back yard of the Neighborhood Bar and Grill (Tr. 154; Tr. 184).

Klopfer knows that "later a man was arrested" (Tr. 154), but does not know who arrested him and thinks this was after dogs were put into the back yard (Tr. 155). Klopfer stated that a person "gave up" back by a small wire fence at the rear of the yard but is unable to state whether he was inside or outside of the fence at the time (Tr. 155).

Although Klopfer was inside the yard, he didn't help Walls to search (Tr. 171); in fact doesn't know whether Walls did. Klopfer was neither asked nor testified as to whether Walls informed him of seeing anyone in the store.

Proceedings:

The charges read to the jury in court were that:

> "Lawrence H. Stewart, entered the store of Eva B. Turner with intent to steal property of another." (Tr. 5)

A motion for a directed verdict of acquittal at the close of the prosecution case, following the testimony of Mrs. Turner and Officer Walls, was denied (Tr. 117). Officer Klopfer was put forward by the prosecution as an unannounced rebuttal witness. A motion to strike his testimony was denied, the court pointing out *inter alia* that if this were done, the defense would have no basis for arguing to the jury the discrepancy between the testimony of Klopfer and the testimony of Walls. (Tr. 167) A motion for a directed verdict of acquittal at the close of Klopfer's testimony was also denied (Tr. 185).

In the closing by the prosecution, the government said to the jury

> "Now, one of the circumstances of this case is that you can look at, when determining whether Mr. Stewart whether he entered with intent to steal the property of another, is that we have heard testimony that a dollar bill was kept in the cash register and this dollar bill tripped the silent burglar alarm, and pursuant to this, Officer Walls responded. (Tr. 190). . . the defendant agrees that at the time of his arrest he had $1.04 on him. (Tr. 198)

The jury was out from 1 p.m. to 4:35 p.m. on July 11 (Tr. 251) and from 10 to 11:10 a.m. July 12 at which time they returned a unanimous verdict of guilty as charged.

Argument

I

Whether Contradiction to a Substantial Degree Between the Two Police Officers Who Were the Only Prosecution Identification Witnesses, Does Not Create Reasonable Doubt as a Matter of Law.

On this point, the facts of record as given above are the argument. We do not seek any extension of present legal theory. Under any of three differing principles of law, the facts as given by the record are grossly inadequate to justify the appellant's conviction.

1. The doctrine of Rouse v. United States, 123 App.D.C. 348; 359 F2d 1014 (1966) as applied to the material contradictions of story between the two police officers.

2. The inherent incredibility of Walls' identification testimony as defined in Jackson v. United States, 122 App.D.C. 324, 353 F2d 862 (1965); and

3. The factors of Kelly v. United States, 90 App.D.C. 125; 194 F2d 150 (1950) as applied to the overriding of appellant's denials by police testimony.

Let us consider these in order.

1. Rouse v. U. S.

This case held that inconsistencies in the statements of the two identifying police as to the presence and movement of defendant (in an alley between R and S Sts!) immediately prior to arrest required remand on the issue of suppression of search evidence.

In Rouse the contradictions were exceptionally minor in character. Here the contradictions between Walls and Klopfer were gross, going directly to the presence or absence of appellant (a) in the store and (b) in the alley.

We digress to point out that the prosecution burden here under the indictment was threefold--that an illegal entry was made--that it was done with intent to commit a crime--that defendant is the person who made such an entry with such a purpose.

Unlawful entry could be implied from Mrs. Turner's statement that a window had been pried open. Intent to commit a crime (or commission?) was argued from testimony that a dollar was missing from a cash register. The relation of the defendant to the situation rests solely upon two things--(1) direct, that Walls saw him in the store through the front window and later identified him as that person, and (2) circumstantial, that Walls claimed to have found him in the rear yard of the restaurant.

Since Walls, in direct contradiction to Klopfer, states that he was alone on Fourteenth Street in front of the store (Tr. 86), Walls is the only person claiming to have seen defendant inside the store. This is clearly the single most important assertion in the testimony. Without it, the prosecution had no shadow of a case.

Yet Klopfer repeated three times (Tr. 153,170,183) that he met Walls on Fourteenth Street in front of the store and talked to him for a minute before both went round to the alley. Nor is there the slightest suggestion in the record that in this minute's conversation with his sergeant, Walls said anything of having seen someone in the store.

This contradiction therefore goes directly to the truth of the first of the two identifying circumstances.

Now let us take the second--that appellant was in the rear yard of the restaurant. Let us first keep in mind that all parties agree that the rear yard had a high (6 ft.) barbed wire topped fence on north and south, a garage on the west. When Walls and Klopfer went into the yard, they did so by breaking the lock on the garage. So the yard was totally closed, yet defendant showed no clothing tears to indicate his climbing the fence or prying the window open.

On this, Walls states that appellant came up behind him from the direction of the alley (where the now opened garage doors were) and "surrendered." Klopfer was there at the time and is unable to say whether appellant was inside or outside the fence. But whether he was inside the fence as Walls says or outside the fence as appellant testified is the only other point of relation between appellant and the asserted crime.

So again the inconsistency of the statements of the two officers goes directly to the accuracy of the single item of circumstantial evidence going to identification of appellant.

We submit that under the doctrine of Rouse, the contradiction involved between the only two identification witnesses on the facts of the identification itself makes the combined statements inadequate as proof of the facts for which it was offered. Unlike Rouse, the contradiction goes not to a preliminary matter such as suppression, but to the essential elements of identification. Accordingly, the prosecution has failed to sustain its burden and this Court should reverse and direct the granting of appellant's motion for acquittal.

2. Jackson v. United States:

In that case this Court held that a conviction must be reversed

> ". . .if it is clear that upon the evidence a reasonable mind could not find guilt beyond a reasonable doubt."

In Jackson, moreover, as distinguished from Rouse, the stories of the two police were consistent with each other. Reversal was instead on "internal contradiction. . .contrary to human experience." It was held that police testimony was "inherently incredible" when it seems "highly questionable in the light of common experience" or describes behavior "in a manner strongly at variance with the way in which we would normally expect a similarly situated person to behave."

This concept of inherent incredibility directly applies to the two identifying circumstances we have already detailed--Walls' assertions of seeing appellant in the store and finding him in the rear yard.

To summarize Officer Walls' testimony: he received a radio notice at 1:59 a.m., while at the corner of Thirteenth and Q (Tr. 68), drove without lights to the Neighborhood Bar and Grill arriving there a minute later (Tr. 69), walked from the car to the front window, "observed a subject inside" "twenty feet from the show window proceeding toward me" (Tr. 70) who "stopped and crouched down behind the bar" (Tr. 71). Walls "proceeded back to the scout car to call for assistance and he turned moving toward the rear of the restaurant." Walls then "lost sight of him." Accordingly, Walls "went back and checked the front porch of the store to see if it had been entered through the front door," inspected the front door which "was all secured, so I then proceeded to the rear of the store,"

driving around in his scout car. It was about thirty seconds after losing sight of the person in the store that Walls started around to the back (Tr.72)

When Walls went back to call for assistance, he turned the spotlight on. (Tr. 82) He did not call out or say anything to the person he saw (Tr. 83).

1. At the time when Walls claimed to have seen a person in the store, Walls was standing at the front window and did not even try the handle of the front door much less take any other action of any kind to call upon the person inside to stop, come forward, or take any other action.

Instead, Walls states that he walked back to his car across six feet of sidewalk, losing sight of the intruder as he turned to his radio (Tr. 85), called for assistance, walked back to check the front door for the first time, all during a period when it could be assumed that any intruder was making an escape.

According to Walls, he didn't know where the other unit which had received the call with him was (Tr. 86),thought it might be in the back in the alley, and then drove around himself to the alley leaving no one in the front of the store.

We suggest to the Court that every step described by Walls is consistent with there being no one visible in the front of the store and inconsistent with any statement that Walls surprised an intruder in the lighted restaurant.

2. Again, the cash registers were in the back of the restaurant. The chain of events which brought Officer Walls to the store had to be initiated under the prosecution's theory by the taking of a dollar bill from one of the registers. This was intended to alert a private alarm system,which

turn alerted the police, who in turn put out the call to Officer Walls and Sergeant Klopfer. We know it took Walls a minute to get to the Neighborhood Bar and Grill (Tr. 69).

If we assume that the three preceding events all took place within a minute, we must, in order to believe Officer Walls, conceive of an intruder who for two minutes after committing the crime is still wandering about a lighted restaurant not on his way to the opened window in the rear but between the cash register and the closed door in the front. We suggest that the concept of such an intruder is strongly at variance with the way in which one would normally expect a similarly situated person to behave.

3. Finally, let us take the statement of Sergeant Klopfer that he stood outside the Neighborhood Bar and Grill discussing the call for a minute with Walls (Tr. 170; 183) before the two of them went around to the alley, without, at this point, considering the contradiction between the two stories. Let us look at Sergeant Klopfer's testimony only from the point of view of its logical inconsistency without any conclusion that Walls had, prior to Klopfer joining him, seen an intruder in the restaurant. There could not have been more important news than such a fact. It would have become imperative that one go around to the alley, one stay in front. If the intruder were actually seen, it seems clear that one of the policemen would have broken in to follow him.

The testimony of Officer Klopfer as to the leisurely debate of the matter on the sidewalk in front of the Neighborhood Bar and Grill between himself and Walls makes Walls' statement of an earlier sighting of an intruder inherently incredible.

4. Turning to the one item of circumstantial evidence that links appellant with anything that may have happened at the Neighborhood Bar and Grill that night--his asserted presence in the enclosed rear yard--we find that the statement made by Officer Walls to place him there is equally inconsistent.

We know that at the time Officer Walls and Sergeant Klopfer were in the back, they described the yard as completely closed, and broke through the garage to get into it. Nothing in the records gives us the dimensions of this rear yard. We do know that it was one garage wide, since a garage closed the alley off. In this yard, Officer Walls states that he spent five to ten minutes with a flashlight looking for his intruder without finding anyone (Tr. 75). Although Klopfer went into the yard with Walls through the garage, he not only didn't help Walls to search (Tr. 171), he doesn't know whether Walls did search.

We suggest to the Court that it is sheerly incredible that two officers could stand in the small enclosed rear yard of a restaurant for five to ten minutes with a flashlight and not find any person attempting concealment; and even in the last analysis, neither Walls nor Klopfer ever did find appellant! Even Walls--who is the only one of the two stating that appellant was in fact in the rear yard--concedes that appellant came up to him from behind on the alley side where the two officers had opened the garage doors.

Therefore, under the rule of Jackson, as well as under the classic circumstantial test as to whether reasonable minds could find the evidence excludes every hypothesis but guilt, Carter v. U.S., 102 App.D.C.227, 252 F.2d 608 (1958); Md. and Va. Milk Prod. Assn. v. U.S., 90 App.D.C. 14, 193 F2d 907 (1952), the situation under the testimony as given is at its best highly ambiguous as to the essential location and movement of appellant, and almost totally consistent with his own testimony of innocence.

3. Kelly v. United States:

We have previously discussed the contradictions between the police statements. Now we come to appellant. In Kelly a conviction was reversed for "lack of sufficient evidence to convict," this court pointing out:

> "Only two persons know whether the words were spoken. The officer says they were, Kelly says they were not. The rest of the evidence is circumstantial."

Seven factors were then listed by this Court for determining the truth value of the defendant's denials.

(a) Unequivocal testimony of innocence by the accused.

(b) Immediate denial of offence on the first available occasion.

(c) Factual inconsistency with the police version.

(d) Character evidence.

(e) A reasonable explanation of presence at the time and place of arrest.

(f) Fact that the officer is shown to have testified falsely on at least one point. And

(g) The interest of the officer in making the arrest.

(a). . .The story given by Stewart at the time of his arrest at the 2nd Precinct and repeated on the trial was totally consistent, coherent and logical, without subsequent change and was unequivocal in its repeated assertions of innocence.

(b). . .Appellant's denials were made immediately at the time he was accosted and arrested.

(c). . .The inconsistency between the stories of appellant and each of the two police is evidenced by the statement of facts.

(d). . .No character evidence was offerred. We do point out that the sentencing record shows no prior felony conviction.

(e). . .There could scarecely be a more reasonable explanation of Stewart's presence at the time and place where he was. While considerable confusion exists as to the amount of time he spent drinking coffee with Jimmy Alexander in the Harvard House and the amount of time it took to walk each block on his way home, he was in fact found at a time and place which was a mid-point between his place of residence and Dupont Circle. And Walls conceded (Tr. 97) that although the breaking and entering is presumed to have taken place within a closed and walled space surrounded with barbed wire, it has been admitted that Stewart showed no marks of having made such an entry, had no tools or instruments capable of forcing a window, and had established by his testimony not an extraordinary or unusual presence at that place and time,but an uncontradicted custom and habit of walking home by the very alley in which he testifies he was stopped by Officer Walls.

(f). . .We have shown that either Walls or Klopfer testified falsely as to the events in front of the store.

(g). . .The seventh factor in Kelly was the interest of the police officer in making an arrest. We point here to footnote 15 in the Jackson decision of this Court noting the police tendency to rationalize evidence. It must

be kept in mind that Officer Walls had been called to the Neighborhood Bar and Grill, from which he drove around the corner of S Street into the alley between R and S. If he found the appellant there as Stewart says he did, and took Stewart through the garage into the rear yard and found evidence of breaking in the pried open window, then it is within reason to believe that Officer Walls would have been convinced that Stewart's presence at that time and place had no innocent motive and that as the premises had in fact been broken into, it would have been he who had done it. From this it would be a short step to Officer Walls' essential addition that he had seen Stewart through the front window of the store. We say that Officer Walls did have an enforcement interest in making an arrest on the call which he had received and that he would have realized completely that the mere presence of Stewart in the alley was not in or of itself an adequate connection to the apparent breaking and entering.

On the rule of Kelly, we submit that the consistent and unequivocal statement of appellant meets the necessary test of creating reasonable doubt as a matter of law as against the testimony of the two police. Cf. Hinton v. U. S., 91 App.D.C. 13, 196 F2d 605, (1952).

II

Apart From Any Question of Its Accuracy, The Identification Testimony Was Insufficient To Permit the Case to Go To the Jury.

We start by noting the recent Supreme Court cases pointing to the inherent dangers of eye witness identification, U. S. v. Wade, 388 U.S. 218, Gilbert v. State of California, 388 U.S. 263, Stovall v. Denno, 388 U.S. 293. The due process problem in such instances is a difficult one to satisfy. As the courts indicated in the Wade case, an accused should not be forced to participate in a police line-up without the benefit of the presence of counsel. In Denno, the Court indicated that the "totality of surrouding circumstances" was a conditioning factor on whether even a single identification could be in violation of due process.

We consider these two essential problems as they apply to the circumstances of appellant's identification. The Wade rule as given by Mr. Justice Brennan is concerned with the quality of the identification itself, just as Denno is concerned with the effect of the surrounding circumstances of the identification. As to the former, Mr. Justice Brennan, speaking in Wade said

> "But the confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even critically, derogate from a fair trial. The vagaries of eyewitness identification are well known; the annals of criminal law are rife with instances of mistaken identification. Mr. Justice Frankfurter once said: 'What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established

> by a formidable number of instances in the records of English and American trials. These instances are recent--not due to the brutalities of ancient criminal procedure.'"

The identification in the present case consists of Walls' statement that he saw a person "approximately twenty feet from the show window, proceedings toward me" (Tr. 70). Walls said "I think there may have been one light on" (Tr. 71). At that time the person seen "stopped and crouched down. . .behind the bar. . .[and]. . .started moving toward the rear of the restaurant" (Tr.71). On this sighting, and on this sighting alone, rests the entire identification by Walls that the defendant was in the restaurant. (Tr. 77).

We submit that such an identification is palpably inadequate. No confirmation was obtained although easily open to inquiry. Appellant was not wearing gloves (Tr. 96) but no fingerprint evidence was taken (Tr. 97) and no implements were found (Tr. 96) even though the asserted crime is stated to have taken place in an area which was completely closed in until the police broke through the back garage.

Contrast this to the sufficient identification described in this Court's opinion in Bell v. U.S., 108 App.D.C. 169, 280 F2d 717 (1960), where the victim not only identified the defendant by describing the clothes he had been wearing, but was able to pick his photo from the police files.

Similarly, if we look at the situation in the light of the Supreme Court's Denno "totality of the surrounding circumstances," we find that the stated eye witness identification was made by an officer whose testimony is otherwise so inconsistent and whose memory of other details occurring at the same time is so vague as to indicate lack of clear recall, militate sharply against the acceptance of this

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courtroom identification by Walls as the figure seen in the dim interior of the Neighborhood Bar and Grill at two o'clock in the morning and lacks the weight required to permit the matter to go to the jury absent corroborative evidence directly linking the appellant with the crime charged.

III

The Judgment Below Should Be Reversed and the Case Remanded for a New Trial Upon the Ground that the Statements of the Prosecution to the Jury Inviting Them to Assume that the Defendant Was Found in Possession of Stolen Property Was Unduly Prejudicial.

The essential point of the corpus delicti in this case was the testimony by Mrs. Turner that a dollar had been taken from a cash register at the Neighborhood Bar and Grill. At no time did the prosecution on the record make any attempt to prove that appellant was found in possession of that money. In fact the indictment itself was in terms of "intent." It is, of course, extraordinarily clear that the possession by appellant of any stolen property from the Neighborhood Bar and Grill would be an identifying circumstance of considerable, if not critical, weight with the jury.

This was equally apparent to the prosecution. Despite the absence of any proof in this regard, the United States in closing its case to the jury referred not only to the testimony that Mrs. Turner had kept a dollar bill in the cash register and that the taking of this bill set off an alarm, but continued

> ". . .the defendant agrees that at the time of his arrest he had $1.04 on him." (Tr. 198)

There was no conceivable purpose for such a statement except to leave the

suggestion in the minds of the jury that they should regard appellant's funds as including the bill stated to have been taken from Mrs. Turner's register. Considering the exceptionally weak relative strength of the Government's evidence on the identification of appellant and his connection to a crime, the suggestion made by the prosecuting attorney to the jury that appellant could be assumed to have been found in possession of stolen property was so prejudicial as to require reversal and remand for a new trial, Jones v. U.S., 119 App.D.C. 213, 338 F2d 553, (1964), McFarland v. U.S., 80 App.D.C. 196, 150 F2d 593 (19).

The seriousness of this statement can be appreciated in considering that the possession of stolen property near the time and place of the theft has been held by this Court to have adequate probative value to sustain a finding of guilt, Wood v. U.S., 120 App.D.C. 163, 344 F.2d 548 (1965), Headen v. U.S., 115 App.D.C. 81, 317 F.2d 145 (1963).

Conclusion

On the record in the case, appellant respectfully submits that his conviction should be reversed and an acquittal directed upon the grounds that reasonable doubt existed as a matter of law by reason of the substantial and material conflict of testimony between the two identifying police officers, the internal inconsistency and inherent incredibility of the testimony of Officer Walls and the inadequacy of the evidence to overcome by police testimony the statements of appellant under the rule of the Kelly case.

Appellant further submits that alternatively such acquittal should be directed on the grounds that the identification testimony, if true, was inadequate as a matter of law.

Further, appellant prays a reversal and remand on the basis of undue prejudice arising from improper statements by the prosecution in closing which indicated the appellant was the possessor of stolen property.

Respectfully submitted,

GEO. STEPHEN LEONARD

Counsel for Appellant
(Appointed by this Court)

Assisted by:

Vernon Martens
(Catholic University Law School)

April 19, 1969

In the
UNITED STATES COURT OF APPEALS
for the
DISTRICT OF COLUMBIA

No. 22487

UNITED STATES OF AMERICA,

Appellee,

v.

LAWRENCE H. STEWART,

Appellant.

APPELLANT'S REPLY BRIEF

United States Court of Appeals
for the District of Columbia Circuit

FILED JUL 3 1969

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CLERK

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In the
UNITED STATES COURT OF APPEALS
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. . . . . .

THE UNITED STATES OF AMERICA, :

Appellee, :

:

v. No. 22437

:

LAWRENCE H. STEWART, :

Appellant.:

. . . . . .

I

Whether the contradiction of testimony by the two police officers was as material and prejudicial as claimed by appellant, or was nothing more than the minor inconsistency argued in the appellee's brief, is a question on which reiterated characterizations by opposing attorneys can be of little further assistance. It is the transcript alone which is determinative. Similarly, on Point I.B. of the Appellee's Brief, the police motivation, logical consistency and sufficiency of the facts related in the

identification testimony are essentially problems for record evaluation by this Court, not for repeated argument here.

II

However, Point II of the Answering Brief calls for reply. That argument denies that any prejudicial error could have arisen as a result of the prosecutor suggesting to the jury on closing that because appellant had a dollar and a few cents in his pocket at the time of his arrest, that the jurymen could infer from this that this dollar bill in appellant's possession was in fact the same unidentified dollar bill which the complaining witness had stated was missing from her cash register--in other words, that appellant was found bythe police with the proceeds of the crime upon him, (Point III, Appellant's Bf. pp. 22-23).

Was such a statement error on the part of the prosecuting attorney, and if so, was it unduly prejudicial to appellant? We submit that both questions must be answered in the affirmative.

The importance of this point to the prosecution is demonstrated by the appellee's brief itself. There we have repeated references to the validity of the conviction of appellant because of the possibility that--absent any evidence whatever on the subject--the two dollar bills referred to in the transcript were the same. Not only does appellee's brief make such references on pp. 2, 4, 5, 6 and 8 in addition to its direct argument under Point II, but at page 2 it is referred to as 'particularly significant.' We agree, and suggest that the jury did also, which is why we press this point. Moreover on the whole case, this possibility that the two pieces of money

were the same is essentially the only factual offering by the prosecution to relate the defendant to the alleged crime, other than the contested identification testimony of Officer Walls.

Such probative importance as appellee gives to possession of the asserted fruits of the crime is fully sustained by the regard which the law has for such proof as a conviction piece.

> ". . .The possession of the fruits of a crime may well be regarded as the foundation for an inference of guilt, requiring explanatory proof from the accused, in the absence of which the fact of possession may be considered sufficient proof of guilt. 30 Am.Jur. 2d 301 Evidence § 1129.

And, in Battle v. United States, 345 F2d 43 (1965), 120 U.S.App.D.C. 221, this Court held that even the district court in instructing the jury could not go beyond permissible comment to suggest that a defendant had possession of goods claimed to have been stolen.

For the purposes of appeal from a conviction, it must be assumed that the jury has in fact made any inference against the defendant-appellant which could be made. Our question then is whether the inference called for by the prosecution fell within that general rule of criminal procedure which permits the prosecuting authority in his closing to refer not only to the facts of evidence, but to all inferences which may reasonably be drawn therefrom. We accept the general proposition as incontrovertible. We state, however, that the inference called for by the appellee in its closing before the jury was not within the realm of reason or common experience. The jury should not have been permitted to draw such an inference. In Cross v. United States, 122 U.S.App.D.C. 20, 353 F.2d 454 (1965) this Court said

> "While a prosecutor must be given some leeway in argument, it is not the heat

> but the light of argument that is the objective. The prosecutor's task is to fight with hard but not foul blows.'.

Let us examine the two elements which make this improper. First, there was no attempt of any kind by the prosecution to make a showing of similarity. Neither bill was described or marked in evidence. No questions were asked of the complaining witness as to markings or other identification data. She was not shown the bill which the police first took from, then returned to appellant. Thus, no foundation for any inference had been laid.

As this Court said in Kenney v. Washington Properties, Inc., 76 U.S.App.D.C. 43, 12[illegible] F2d 612 (1942)

> 'We have often said that, while a satisfactory conclusion may be reached through an inference from established facts, there must still be facts proved from which the inference can be drawn. No inference or fact may be drawn from a premise which is wholly uncertain.'

Second, not only is the establishment of the underlying facts from which the inference is sought to be drawn required, but the rational relationship of the asserted inference to such proof is essential to its validity. As Mr. Justice Holmes noted in McFarland v. American Sugar Refinery Company, 241 U.S. 79, 36 Sup.Ct. 4[illegible] (1916) not even the legislative power of a state can make an illogical inference of fact the basis of criminal guilt.

> 'A presumption of fact or inference cannot ordinarily be raised from some fact proved unless a rational connection exists between such fact and the ultimate fact presumed. In other words, a fact can be regarded as the basis of an inference only where the inference, on the basis of human experience, is a probable or natural explanation of the fact, and logically flows from the fact. Inferences

> may not be drawn from one transaction to another that is not specifically connected with it, merely because the two resemble each other, but must be linked together by the chain of cause and effect and common experience.' 29 Am.Jur.2d, 197 Evidence § 162.

So, in Dunn v. United States, 307 F2d 883 (5th Cir. 1962) prejudicial error was held to have occurred in a closing statement which allowed the jury to infer from the occupation of the defendant as a polititian that he would take kick-backs on public contracts.

And this rulesas to the rationality of inference required with respect to possession of the fruits of a crime was referred to in Bollenbach v. United States, 326 U.S. 607, 66 Supt.Ct. 402 (1946) where it was held that mere possession of stolen securities in New York was not a permissible basis for allowing the jury to infer that they had therefore been transported interstate by the defendant from Minnesota where they had been stolen. Reference was then made by the Court on the limited scope of such inferences to Wigmore, 'Evidence' (3d Ed. 1940) § 2490-2494; Morgan, 'Some Observations Concerning Presumptions' (1931) 44 Harv. L. Rev.906; Denning, 'Presumptions and Burdens' (1947) 61 L.Q. Rev. 379.

Appellant submits to the Court that on the foregoing authority, prejudicial error necessarily occurred on the trial of appellant with respect to the closing argument by the prosecution in suggesting to the jury that it could find that two unidentified dollar bills, neither of which was an exhibit before the Court could in fact be one and the same and thereby evidence that the fruits of the crime were found in the appellant's possession. Our limited research has not found a case directly in point. We do suggest to this Court, however, that it would be even more coincidental if each of the persons present

at the scene of the asserted crime had not had one or more dollar bills in their possession, than if they had. We suggest that more than a majority of all adults away from their homes are in possession of money probably including one or more dollar bills. At the very least, the possession of such a bill is not so unusual, not so uncommon, not so at variance with ordinary experience and customary behavior as to be capable of founding a rational inference that the dollar bills referred to in the transcript were in fact the same.

Appellant's conviction should be reversed, his motion to dismiss the indictment at the close of the trial should be granted.

Respectfully submitted,

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